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IN THE
COURT OF APPEALS OF INDIANA

PAMELA COOMER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0605-CR-246
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben Hill, Judge
Cause No. 49F18-0504-FB-066486

January 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Pamela Coomer appeals her conviction for Theft,[1] a class D felony. Specifically, Coomer claims that the evidence was insufficient to support the conviction and that the order of restitution was excessive. Coomer also maintains that her sentence cannot stand because the trial court failed to properly find and weigh the mitigating and aggravating factors that were apparent from the record and that her sentence was inappropriate in light of the nature of the offense and her character. We conclude that the evidence was sufficient to support the conviction and that Coomer's sentence was not inappropriate. However, finding that the restitution order was erroneous, we affirm in part and remand this cause to the trial court with instructions that it hold a subsequent hearing as to the amount of restitution that Coomer owes.

FACTS

In February 2005, Coomer and her boyfriend were living rent-free in the spare bedroom of James Elliott's house. At some point, Elliott noticed that a variety of items from the house were missing, including cds, dvds, video games, a VCR, a DVD player, and an X-Box game. On February 25, 2005, Coomer pawned five cds at a pawnshop, for which she received a total of $25.00.

In April 2005, Elliott notified the police about the stolen items after his roommate looked through the spare bedroom and discovered some pawnshop receipts. Thereafter, Detective Ron Knight summoned Elliott to the police station, where Elliott identified five cds and several X-box games that had disappeared from his home when Coomer was

[1] Ind. Code § 35-43-4-2.

living there. During an investigation, Coomer's fingerprints were found on the pawnshop receipt for the sale of the cds. The receipt of the sale of the X-box games, dated March 8, 2005, bore the name of William Kirby, a friend of Coomer's.

Coomer was charged only with the theft of the cds. Following a bench trial on March 7, 2006, she was found guilty as charged. At sentencing, the State requested Coomer to make restitution in the amount of $718, which included other property belonging to Elliott that was still missing from his house, including a VCR, television, and video games. The trial court indicated that it did not know if Coomer had stolen all of the items for which restitution was being requested, and absent any evidence showing that she acted in concert with Kirby, the trial court determined that Coomer could only be ordered to make restitution for the items for which she was charged and convicted.

The trial court also determined that the nature of Coomer's offense was aggravated because Elliott had taken Coomer into his home and had given her food and shelter and that she "repaid" him by taking his property. Tr. p. 21. As a result, the trial court imposed the presumptive 545-day sentence for a class D felony,[2] suspended 180 days of that sentence, and ordered Coomer to probation. Coomer was also ordered to pay $250 in restitution as a condition of probation. She now appeals.

[2] Ind. Code § 35-50-2-7. We note, however, that Indiana's sentencing statutes were amended by P.L. 71-2005, sec. 7, with an emergency effective date of April 25, 2005, to alter "presumptive" sentences to "advisory" sentences.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Coomer first claims that the evidence was insufficient to support her conviction. Specifically, Coomer contends that she is entitled to a reversal because the evidence failed to link her to the crime in that Elliott was not certain that the cds that were stolen from him were the same ones that were recovered from the pawnshop.

When addressing sufficiency of the evidence claims, this court will not reweigh the evidence or judge the credibility of the witnesses, and we will respect the factfinder's "exclusive province to weigh conflicting evidence." McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). When considering only the evidence and reasonable inferences that support the verdict, we must decide whether there is evidence of probative value from which a reasonable trier of fact could infer guilt beyond a reasonable doubt. Alexander v. State, 819 N.E.2d 533, 540 (Ind. Ct. App. 2004). A mere reasonable inference from the evidence supporting a verdict is enough for us to find evidence to be sufficient. Herron v. State, 808 N.E.2d 172, 176 (Ind. Ct. App. 2004), trans. denied. Also, the uncorroborated testimony of a victim is generally sufficient to sustain a criminal conviction. Morrison v. State, 824 N.E.2d 734, 743 (Ind. Ct. App. 2005), trans. denied.

Additionally, we note that when a conviction is based on circumstantial evidence, we will not disturb the verdict if the factfinder could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt. Herron, 808 N.E.2d at 176. We need not find that the circumstantial evidence overcomes every reasonable

hypothesis of innocence; rather, there must merely be a reasonable inference from the evidence supporting the verdict for us to find the evidence sufficient. Id.

To convict Coomer of theft, the State was required to prove beyond a reasonable doubt that she: 1) knowingly; 2) exerted unauthorized control over Elliott's property; 3) with the intent to deprive Elliott of any part of the property's value or use. I.C § 35-43-4-2. The State's charging information alleging that Coomer committed theft reads in pertinent part as follows:

> On or about February 25, 2005, in Marion County, State of Indiana, at 5620 W. Washington St. Location, the following named defendant, Pamela Coomer, did knowingly exert unauthorized control over the property, to wit: 5 CDs, of another person, to wit: James Elliott, with the intent to deprive the person of any part of its value or use.

Appellant's App. p. 17 (emphasis added).

Elliott testified at trial that Coomer was living at his residence in February 2005, when he discovered that some of his property—including five cds—were missing. Tr. p. 2-4. Elliott did not give Coomer permission to take the items, and Elliott reported the missing items to the police after his roommate discovered some pawnshop receipts in the spare bedroom where Coomer had been staying. Id. at 8. A pawnshop receipt bearing Coomer's fingerprints and signature established that she pawned five cds on February 25, 2005. Id. at 14-15; State's Ex. 3. The police then summoned Elliott to the station, where he identified the cds and some other items as his property that had disappeared while Coomer was living at the residence. Tr. p. 5-6.

Although Elliott admitted that he had not specifically marked the cds for identification purposes, the trier of fact could have reasonably concluded that the

recovered cds were Elliott's because the same five cds were taken from his house at the time that Coomer pawned them. In light of this evidence, it was reasonable for the trial court—as the factfinder—to infer that the five cds shown in one of the State's Exhibits were Elliott's, given that the police recovered the cds from the pawn shop after Elliott had supplied the police with the receipts that had been found in his spare room. In essence, Coomer's challenge to the sufficiency of the evidence amounts to an invitation for us to reweigh the evidence—an invitation that we decline. Thus, we conclude that the evidence was sufficient to support Coomer's conviction.

II. Sentencing

A. Aggravating and Mitigating Factors

Coomer argues that the trial court's imposition of the one and one-half year presumptive sentence[3] for a class D felony cannot stand because "the trial court failed to properly find and balance the mitigating and aggravating factors" that were apparent in the record. Appellant's Br. p. 14. Coomer further maintains that her sentence was inappropriate in light of the nature of the offense and her character.

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[3] As previously noted, our sentencing statutes were amended on April 25, 2005, to alter "presumptive" sentences to "advisory" sentences. We recently addressed the class of defendants, like Coomer, who committed an offense before, but were sentenced after, the effective date of the revised statute. See Walsman v. State, No. 69A04-0512-CR-701, 2006 WL 3000102, at *2-*5 (Ind. Ct. App. Oct. 23, 2006) (holding that the trial court must apply the statutory scheme in effect on the date that the defendant committed the offense). We believe that the rule advanced in Walsman should apply and that the propriety of Coomer's sentence should be reviewed under the former sentencing statute because Coomer committed the offense two months before the effective date of the revised sentencing scheme. In accordance with that version, "A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2 years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances." Ind. Code § 35-50-2-7.

In addressing Coomer's contentions, we first note that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). And those decisions are given great deference on appeal and will only be reversed for an abuse of discretion. Beck v. State, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003).

Our Supreme Court has determined that a single aggravating factor may be sufficient to support an enhanced sentence. Powell v. State, 769 N.E.2d 1128, 1135 (Ind. 2002). Additionally, the finding of mitigating factors is within the trial court's discretion. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003). The trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). The trial court need not consider alleged mitigating factors that are highly disputable in nature, weight, or significance. Newsome, 797 N.E.2d at 293. Moreover, the trial court is not required to give the same weight to mitigating factors as does the defendant. Id. On appeal, the defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record. Spears, 735 N.E.2d at 1167.

In this case, Coomer argues that the trial court improperly found that her sentence could be aggravated because she breached her "position of trust." Appellant's Br. p. 15. Notwithstanding this contention, there is no evidence that the trial court relied upon such a factor to aggravate her sentence. Specifically, when the trial court addressed Coomer at the sentencing hearing, it commented as follows: "Here's a man that takes you into his house and give you food and shelter. Last year. Over a year ago. And what do you do?

You take his property." Tr. p. 21. Regardless of whether Coomer was in a "position of trust" as she contends, it is undeniable that Elliott had opened his home to her and that she repaid his kindness by stealing property from him. That said, it is apparent that the trial court was merely commenting on the nature and circumstances of the offense. In essence, the trial court was of the belief—and rightly so—that the theft in this instance was more egregious than one that might have occurred between total strangers. See Kile v. State, 729 N.E.2d 211, 214 (Ind. Ct. App. 2000) (holding that a trial court may consider the particularized factual circumstances of the case to be an aggravating factor). Hence, there was no error with respect to this issue.

Additionally, there is no merit to Coomer's contention that the trial court might "have considered [her] decisions not to plead guilty as an aggravator." Appellant's Br. p. 17. At the sentencing hearing, the trial court commented as follows: "[t]his matter could have been resolved, from what I understand, by a plea agreement if restitution had been paid on this matter." Tr. p. 21. The trial court went on to state that Coomer "should have cash in hand," id. at 21, and that if a defendant wants a sentence below the presumptive he or she should "[c]ome into the Court with money in hand." Id. at 22. Contrary to Coomer's claims, it is apparent to us that the trial court was simply noting that the dispute over restitution was the reason why a plea bargain had not been reached and that Coomer waited over a year—until after she had been found guilty—to express a willingness to make restitution. Id. at 21-22. In essence, the trial court was simply stating that Coomer's willingness to make restitution at such a late date was not a compelling reason to depart from the presumptive sentence, and it was merely explaining why Coomer's

offer of restitution was not a mitigating circumstance. Hence, Coomer has not established that the trial court was imposing a harsher sentence because she had not pleaded guilty as charged. Thus, Coomer's claim fails.

Coomer also contends that she was entitled to a lesser sentence because the trial court failed to identify her purported lack of criminal history as a significant mitigating circumstance. Indeed, a trial court must consider a defendant's criminal record during sentencing and may take into account as a mitigating circumstance the defendant's lack of a history of criminal activity. Weaver v. State, 845 N.E.2d 1066, 1073 (Ind. Ct. App. 2006), trans. denied. Generally, a lack of a criminal record must be given substantial weight as a mitigator. Leone v. State, 797 N.E.2d 743, 748 (Ind. 2003). However, our trial courts are not required to do so. Bunch v. State, 697 N.E.2d 1255, 1258 (Ind. 1998).

While the trial court in this case made no specific finding of mitigating circumstances at the sentencing hearing, it is apparent that it granted Coomer mitigating credit for some factor because it did not impose an enhanced sentence after finding the existence of the above aggravating circumstance. Indeed, the only mitigating factors that were argued by Coomer at sentencing were her minimal criminal history and her lack of drug or alcohol problems. Tr. p. 19, 21. And even if we assume solely for argument's sake that the trial court might have overlooked Coomer's lack of criminal history as a mitigating factor, she is not entitled to relief in light of the properly found aggravating factor and the trial court's decision to impose the presumptive sentence. As a result, we cannot say that the trial court abused its discretion when considering and balancing the aggravating and mitigating circumstances that were apparent from the record.

B. Appropriateness of Sentence

Coomer next argues that the trial court's imposition of the presumptive sentence was inappropriate in light of the nature of the offense and her character. Indiana Rule of Appellate Procedure 7(B) provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." Purvis v. State, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005), trans. denied.

As for the nature of the offense, while Coomer may only have been convicted of stealing five cds, she was a guest in Elliott's home, and he permitted her to live there rent-free. Tr. p. 4. Elliott also provided Coomer with free food on occasion, and she responded to such charitable giving by stealing his property. In our view, these circumstances suggest that Coomer's criminal activity was far more significant than the mere theft of five cds. For these reasons, we cannot say that the imposition of the partially-suspended presumptive sentence was inappropriate when considering the nature of the offense.

As for Coomer's character, the fact that Coomer stole from the person who was providing her with food and shelter speaks volumes. In light of this circumstance, we cannot say that the sentence was inappropriate when considering Coomer's character.

B. Restitution

Finally, Coomer claims that the restitution order must be set aside. Specifically, Coomer maintains that the amount of restitution ordered by the trial court was excessive because it was not based upon the evidence that was presented at trial.

In resolving this issue, we note that a trial court may order a person convicted of a felony to pay restitution to the victim of the crime as part of the sentence or as a condition of probation. Ind. Code § 35-50-5-3(a); Little v. State, 839 N.E.2d 807, 809 (Ind. Ct. App. 2005). The restitution order must be based on the "actual loss" suffered by the victim. I.C. § 35-50-5-3(a); Shane v. State, 769 N.E.2d 1195, 1199 (Ind. Ct. App. 2002). Put another way, the amount of actual loss is a factual matter that can be determined only upon the presentation of evidence. Shane, 769 N.E.2d at 1199. Unless a defendant agrees otherwise, the trial court may only order restitution with respect to the crimes for which the defendant was convicted. Kinkead v. State, 791 N.E.2d 243, 243 245-46 (Ind. Ct. App. 2003).

In this case, the State concedes—and we agree—that the order of restitution was improper. The only evidence presented at the sentencing hearing regarding the payment of restitution was the cost of five cds, which amounted to between $15 and $20 per cd. Tr. p. 9. Coomer acknowledged at the sentencing hearing that she was "sorry about the items that were missing" and that she was "willing to pay [Elliott] back for" the "ones that [she took] that have been accounted for today," tr. p. 21, perhaps indicating her willingness to make restitution in an amount greater than the value of the cds. Nonetheless, the restitution order must be supported by evidence to demonstrate the value

of a victim's loss, and there is no evidence here that establishes how the trial court arrived at an amount of $250. As a result, remand is appropriate for the trial court to determine the amount, if any, of Elliott's actual loss for purposes of Coomer's payment of restitution.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions that the trial court hold a subsequent hearing on the issue of restitution.

DARDEN, J., concurs.

ROBB, J., concurs in result.